Supreme Court, U.S.
FILED
DEC 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

87-936

No.

In the Supreme Court

OF THE

United States

MARY M. WITTEMAN,
Petitioner,

VS.

JACK BARRY CABLE TV,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

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QUESTIONS PRESENTED

1. Whether the Takings Clause of the United States Constitution, as interpreted by this Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L.Ed.2d 868, 102 S.Ct. 3164 (1982), applies to a servient property owner's rights in real property subject to public utility easements, therefore invalidating both 47 U.S.C. 541(a)(2) and California Government Code § 53066.

2. Whether the California Court of Appeal's failure to consider Petitioner's rights in property subject to public utility easements, as established by the California Supreme Court in *Pasadena v. California-Michigan Land and Water Co.*, 17 C.2d 576, 110 P.2d 983 (1941), represents an unpredictable change in state law, and thus itself effects a taking of Petitioner's property.

TABLE OF CONTENTS

	Page
Petition for Writ of Certiorari to the California Court of Appeal	1
I.	
Citations to Record Below	1
II.	
Jurisdiction	2
III.	
Statutes Challenged and Constitutional Authority	2
IV.	
Statement of the Case	3
A. Ruling and Positions Below	3
B. Statement of Facts	4
V.	
Argument	8
A. This Court Has Jurisdiction Over the Case	8
1. Petitioner has Challenged the Constitutionality of Both a State and Federal Statute	8
2. To the Extent That the Court of Appeal's Decision Was Not Decided on a Federal Ground, It Represents an Attempt to Avoid the Federal Questions Raised by California Government Code § 53066 and by 47 U.S.C. Section 541(a)(2)	8
a. The Decision of the California Court of Appeals is Directly Contrary to Settled California Law, and has no Fair or Substantial Basis in California Law	10

TABLE OF CONTENTS

Page

b. There was no Fair or Substantial Basis for the California Court of Appeal's Refusal to Consider the *Pasadena* Case, and thus this Court Is Obligated to Examine State Law for Itself to Determine Whether the Statutes in Question Effect a Taking of Petitioner's Property Rights Without Just Compensation 12

3. The California Appellate Court's Failure to Consider Witteman's Property Rights in the Subject Easements as Established by the California Supreme Court in *Pasadena v. California-Michigan Land and Water Company* Represents an Unpredictable Change in California Property Law, and Thus Itself Effects a Taking of Her Property..... 13

B. Why It Matters..... 15

1. Under the Court of Appeal's Decision, Mrs. Witteman Loses Significant Property Rights 15

2. Recent Decisions of This Court Support Petitioner's Contention that her Property Has Been Taken Without Just Compensation 17

3. Both Courts and Commentators Have Recognized the Contradictions in the Use of Public Utility Easements by Private Cable Companies 19

4. A Decision for Petitioner Is Not a Decision Against Cable Television 20

VI.

Conclusion 22

TABLE OF AUTHORITIES

Cases

Page

Anderson v. Southern California Edison Co., 77 Cal. App. 328, 335 (1926) 16
Consolidated Cable Utilities v. City of Aurora, 439 N.E.2d 1272 (1982) 19
Devon-Aire Villas Homeowners Association v. Americable Associates, 10 F.L.W. 2786 (1985) 20
Federal Communications Commission v. Florida Power Corporation, ___ U.S. ___, 107 S.Ct 1107 (1987) 17
First English Evangelical Lutheran Church v. County of Los Angeles, ___ U.S. ___, 107 S.Ct. 2378, 2393 (1987) ..18, 19
Hughes v. State of Washington, 389 U.S. 290, 19 L.Ed. 2d 530, 88 S.Ct. 438 (1967) 13, 14
Indiana ex. rel. Anderson v. Brand, 303 U.S. 95, 82 L. Ed. 685 (1937) 8, 12, 13
Kaiser Aetna v. United States, 444 U.S. 164, 179-180 (1979) 16
Keystone Bituminous Coal Association v. DeBenedictus, ___ U.S. ___, 107 S.Ct. 1232, 1244, n.18 (1987) 18
Lawrence v. State Tax Commissioner, 286 U.S. 276-285, 76 L.Ed. 1102 (1931) 13
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 73 L.Ed.2d 868, 102 S.Ct. 3164 (1982) ..... passim
Loretto v. Teleprompter Manhattan CATV Corp., 58 N.Y.2d 143, 146 N.E.2d 428 (1983) 21
Los Angeles v. Howard, 244 Cal. App. 2d 538, 549, 53 Cal. Rptr. 538 (1966) 18
Mann v. Cracchiolo, 38 Cal. 3d 18, 30, 210 Cal. Rptr. 762 (1985) 7
Nollan v. California Coastal Commission, ___ U.S. ___, 107 S.Ct. 3141, 3145 (1987) 19
Pasadena v. California-Michigan Land and Water Co., 17 C.2d 576, 110 P.2d 983 (1941) ..... passim
Preferred Communications v. City of Los Angeles, ___ U.S. ___, 90 L.Ed.2d 480, 106 S. Ct. 2034 (1986) 16
Salvaty v. Falcon Cable Television, 165 Cal.App. 3d 798, 212 Cal. Rptr. 31 (1985) 7, 10

TABLE OF AUTHORITIES

CASES

	Page
Southern California Edison Co. v. Bourgerie, 9 Cal. 3d 169, 172, 107 Cal. Rptr. 76 (1973)	18
Texas Power & Light v. F.C.C., 784 F.2d 1265, 1273 (5th Cir. 1986)	18
Western Union Telegraph Co. v. Pennsylvania Railroad Co., 195 U.S. 540 (1904)	18
Constitution	
Fifth Amendment of the United States Constitution	3
Article 1, Section 14 of the California Constitution	18
Statutes	
28 U.S.C. § 1257(3)	2
47 U.S.C. § 541(a)(2)	passim
47 U.S.C. § 541 (c)	17
California Code of Civil Procedure Sections 437(e) and 473	7
California Evidence Code Section 451	7
California Evidence Code Section 452	7
California Government Code § 53066	passim
Los Angeles City Ordinance No. 151,016	6
Other Authorities	
Danielson and Wheeler, "*The Status of the Cable Antenna Television Industry and Proposal for State Regulation*," 2 Pac. L.J. 528, 571 (1971)	20
House Report No. 98-934, at 59, reprinted at 1984 U.S. Code Cong. & Admin. News 4655, 4696	8
Miller and Starr, *Current Law of California Real Estate*, § 18:64, at 383 (1977)	6
Noam, "*Towards an Integrated Communications Market: Overcoming the Local Monopoly of Cable Television*," 34.2 Fed'l Communications L.J. 21 (1982)	16-17
I. Pool, *Technologies of Freedom*, 169-74 (1983)	17
California Rule of Court 12	7
California Rule of Court 29.4(c)	2

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PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

Petitioner Mary F. Witteman (sometimes hereinafter "Witteman") prays a writ of certiorari issue to review the opinion of the California Court of Appeal, Second Appellate District, entered in favor of Respondent Jack Barry Cable TV ("Respondent" or "cable company")[1] on July 29, 1986, and left undisturbed by the California Supreme Court's dismissal of review by order of September 3, 1987.

I.

CITATIONS TO RECORD BELOW

The opinion of the California Court of Appeal is reported at 183 Cal. App. 3d 1001, 228 Cal. Rptr. 584, and 192 Cal. App. 3d 1619 ("reprinted without change to permit tracking pending disposition on review by the [California] Supreme Court"). The Court of Appeal's opinion is also reprinted here as Appendix C.

[1] Respondent reportedly has been recently acquired by American Cable Systems. Pursuant to Supreme Court Rule 21.1(a), Petitioner notes that the caption of the case in this Court contains the names of all parties to the Court of Appeal proceedings.

The California Supreme Court granted review by minute order dated November 20, 1986. The California Supreme Court dismissed its review as "improvidently granted" pursuant to California Rule of Court 29.4(c), by minute order dated September 3, 1987 and reprinted here as Appendix D, and remanded the cause to the Court of Appeal. On September 10, 1987, the Court of Appeal issued Notice of Remittitur and declared its July 29, 1986 opinion "now final".

II.

JURISDICTION

This Petition is timely. The July 29, 1986 opinion of the California Court of Appeal was made final by that Court on September 10, 1987 (see Appendix E), after dismissal of review by the California Supreme Court. There was no motion for rehearing.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3), as Petitioner challenges the constitutionality of two statutes, one federal and one state, which both purport to authorize the use of public utility easements by private cable television companies. Petitioner claims that both statutes (as applied, if not *per se*) are repugnant to the Constitution of the United States, in that they effect a taking of her property without compensation.

III.

STATUTES CHALLENGED AND CONSTITUTIONAL AUTHORITY

Both California Government Code § 53066 (hereinafter "Section 53066") and 47 U.S.C. § 541(a)(2) (enacted in the Cable Communications and Policy Act of 1984, hereinafter "Cable Act") purport to give cable television franchisees the right to use public utility easements. Section 53066 (reprinted in full herein as Appendix B) states in relevant part that a city or county may authorize by franchise the construction of a cable system. Such city or county may further

> *authorize the grantee* (of the franchise) *to place wires*, conduits and appurtenances for the community antenna television system *along or across such public streets*, highways, alleys, public properties *or public easements of said city . . . . Public easements*, as used in this section *shall include* but shall not be limited to *any easement created by dedication to the city or county . . . for public utility purposes* or any other purposes whatsoever. (Emphasis added.)

The federal statute (hereinafter "Section 541(a)(2)") merely states that cable television franchisees shall have access (*inter alia*) to easements over private property "dedicated for compatible purposes." Section 541(a)(2) is reprinted in full herein as Appendix A.

Mrs. Witteman claims that the presence of cable television equipment and personnel in her backyard, pursuant to the above two statutes, violates the Fifth Amendment of the United States Constitution, which states "nor shall private property be taken for public use, without just compensation."

IV.

STATEMENT OF THE CASE

A. Ruling and Positions Below

The Court of Appeal held that the Respondent cable company was entitled to use either of two easements over Mrs. Witteman's land (for telephone and electricity, respectively) because the owners of those easements could apportion their interests to the cable company. Although strenuously argued by Witteman, the Court of Appeals did not even address the case of *Pasadena v. California-Michigan Land and Water Co.*, 17 C.2d 576 110 P.2d 983 (1941) (hereinafter "*Pasadena*"), holding that public utility easements are not exclusive (the predicate of apportionability), and that the servient owner retains the right to grant subsequent non-interfering easements to third parties. The Court of Appeal distinguished this Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.* 458 U.S. 419, 73 L.Ed.2d 868, 102 S.Ct. 3164 (1982) (hereinafter "*Loretto*") by citation to an earlier

decision which held that "*Loretto* . . . did not involve an easement." Appendix C at 6.

Witteman had argued that the theory of apportionability, as applied to the easements over her property, is totally at odds with the common law, and contrary to the California Supreme Court's previous ruling in *Pasadena*. The use of Mrs. Witteman's property by the cable company is therefore a taking without compensation.

In the California Supreme Court, Petitioner was joined by several amici curiae: both the Pacific Legal Foundation and the Riviera Homeowners Association filed amicus briefs asserting the unconstitutionality of the challenged statutes; the Public Media Center of San Francisco filed an amicus brief urging that there is no special public interest supporting the creation of new public utility easement rights for the American cable television industry as presently constituted; and General Telephone Company of California (the owner of one of the easements in question) filed an amicus brief *denying* that it had ever apportioned its easement to the cable company.

In addition, the following amici also filed briefs commenting on the case: California Cable Television Association; City of Los Angeles (joined by other cities); Preferred Communications, Inc.; Century Federal Inc.; and Pacific West Cable Company. In spite of the enormous public importance of this case, and of the diverse comment generated by it, and in spite of the essential legal questions left unanswered by the Court of Appeal's opinion, the California Supreme Court dismissed review as described above.

B. Statement of Facts

In early 1981, Petitioner Mary F. Witteman observed two men on her property who were strangers to her. They wore no uniform or other indication that they were employed by either Southern California Edison or General Telephone Company, public utility companies that occasionally came onto Appellant's property to service the telephone and power lines which run across the rear of her lot. Upon being confronted by Mr. and Mrs. Witteman, the men confessed that they were employed by Respondent Barry.

When asked to leave, they did, but returned later saying that they did not need the property owner's permission to be on the property. Respondent subsequently forwarded to Witteman a copy of California Government Code Section 53066 (reprinted here as Appendix B) as proof and justification of Respondent's "authority" to be on the property.

In the instant case, there are two easements, both dedicated for public utility purposes, existing in more or less the same physical space on Witteman's property. In 1929, Witteman's predecessor-in-interest (Title Guaranty and Trust Co.) granted for one dollar's consideration to the City of Los Angeles (hereinafter "City") an easement "for the transmission of electrical energy" (hereinafter the "City easement"). The deed and grant were accepted by the Secretary of the Board and Water and Power Commissioners for the City of Los Angeles.

In 1957 other predecessors-in-interest of Witteman (Fritz Burns and Playa del Rey Community Homes) granted, again for one dollar's consideration, an easement to the General Telephone Company of California (hereinafter "General") "for the transmission of electrical energy and for telephone lines." The 1957 deed continues:

> RESERVING, HOWEVER, the right to convey an easement for any and all public utilities over the property hereinabove described, which shall be subject to the easements hereby conveyed, *it not being the intention of all parties hereto that said easement shall be exclusive.* (Emphasis added.)

This will be referred to as the "telephone easement."

In 1958, Witteman and her husband acquired title to the property in question. Witteman's deed included a specific reservation in the grantor with respect to easements "for the construction . . . and operation therein and thereon of telephone, telegraph and electrical light and power poles." The reservation, however, did "not preclude the grantee from any use of the surface of said land provided such use does not interfere with the installation, opera-

tion or maintenance of the aforementioned *utilities*." (Emphasis added.)[2]

In 1978, the City granted Barry a franchise for cable television operations, pursuant to Section 53066, for that portion of the City which includes Witteman's property. Los Angeles City Ordinance No. 151,016.

In 1979, Barry and General entered into a Pole Lease Agreement, pursuant to which General granted Barry permission to attach Barry's cable television wire to General's poles. The Pole Lease Agreement, however, was contingent on Barry's obtaining all necessary permission from the servient property owners. To date, Barry has made no effort to obtain any permission from the Wittemans. The Pole Lease Agreement also states that "(u)pon notice from Licensor to Licensee that the use by Licensee of any pole or poles of Licensor is forbidden by . . . (the) property owners, permission to attach to such pole shall immediately terminate and Licensee shall remove its equipment therefrom."

On or about January 18, 1982, Mrs. Witteman filed her First Amended Complaint, alleging unconstitutional impairment of contract, trespass, and an unconstitutional taking, and seeking damages and/or injunctive relief against Barry and General.

On or about February 15, 1985, the trial court granted General's motion for summary judgment, leaving only Barry as a defendant. Witteman has appealed that ruling, and Witteman and General have stipulated to stay that appeal pending the outcome of the instant appeal.

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[2] By declaration filed with the California Supreme Court, the grantor of this property Playa del Rey Community Homes, by its agent W.K. Skinner (signatory to Petitioner's deed), declared that it is no longer doing business, and that its successor corporation was liquidated in October, 1981. No assignment of the retained easement rights was made. The declaration states further that Playa del Rey Community Homes intended the rights to be retained "for the purposes of granting [further] easements to public utilities." In any event, it would appear that whatever rights were reserved by Playa del Rey Community Homes have reverted back to Petitioner. *See* Miller and Starr, *Current Law of California Real Estate*, § 18:64, at 383 (1977).

On or about June 26, 1985, the trial court granted Barry's motion for summary judgment, declaring that *Salvaty v. Falcon Cable Television,* 165 Cal.App. 3d 798, 212 Cal. Rptr. 31 (1985) was "dispositive of all issues." The Court of Appeals added that "the determination of whether Plaintiff has stated a cause of action is one of law." Appendix C at 2.

As the Court of Appeal also noted, " . . . it appears that the facts which gave rise to this dispute are substantially uncontraverted." *Id.* Respondent does contest one fact, however: that the easements, since their inception, have been used always and exclusively for public and municipal purposes. Respondent does not deny that this is so, but claims the fact was never properly before the trial court. Witteman contends that it was.[3] Even if it was not, the prior use of the easement is something of which the California courts could, and should, have taken notice.[4]

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[3] This particular dispute is part of the larger question as to whether Petitioner timely filed her opposition for summary judgment. Petitioner has consistently argued that her opposition papers were properly before the court, pursuant to California Code of Civil Procedure Sections 437(e) and 473, and the California Supreme Court's decision in *Mann v. Cracchiolo,* 38 Cal. 3d 18, 30, 210 Cal. Rptr. 762 (1985).

The fact of the easement's prior use was stated in Mary F. Witteman's Declaration in Opposition to Barry's Motion for Summary Judgment. Petitioner maintains that it was an abuse of discretion for the trial court not to have allowed the filing of this Declaration. The trial court did, however, allow Witteman to "lodge" her declaration with the court. Rule 12 of the California Rules of Court states that "any paper . . . lodged with the Superior Court shall be deemed filed." The fact of the easement's prior use probably would not have swayed the trial court, as it found *Salvaty* "dispositive of all issues."

[4] Petitioner asked the California courts to consider the prior use of the easement under California Evidence Code Section 451, which provides that "judicial notice *shall* be taken of . . . the facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute." (emphasis added.) Petitioner also cited to California Evidence Code Section 452, which states that "judicial notice *may* be taken of . . . *(cont'd)*

V.

ARGUMENT

A. This Court Has Jurisdiction Over The Case

1. Petitioner has Challenged the Constitutionality of Both a State and Federal Statute.

Where a state court deems a federal question "to be before it, [and] actually entertains and decides that question adversely to the federal right asserted, this Court has jurisdiction to review the judgment." *Indiana ex rel. Anderson v. Brand*, 303 U.S. 96, 98, 82 L.Ed 685 (1937). Here, Petitioner asserted *her* right to grant subsequent easements in the subject property, and her right to be free of an uninvited physical occupation of her property (and of the attendant entries of service personnel thereon). Those assertions were rejected by the Court of Appeals.

California Government Code Section 53066 and 47 U.S.C. Section 541(a)(2) authorize private cable television companies to place their cables along public utility easements over private property.[5] Petitioner argued before both the California Court of Appeal, and the Supreme Court that "Section [541(a)(2)] of

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(g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.

(h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."

[5] As Petitioner pointed out, both before the Court of Appeals and in her Opening Brief and before the California Supreme Court (at p. 59 ff.), the federal statute, 47 U.S.C. 541(a)(2) authorizes such use in a more circuitous manner. Section 541(a)(2) states only that cable television franchises shall have access to easements "dedicated for compatible purposes." The legislative history of the 1984 Cable Act, however, reveals that easements for "compatible purposes . . . would include, for example, an easement or right-of-way dedicated for electric, gas, or other utility transmission." House Report No. 98-934, at 59, reprinted at 1984 U.S. Code Cong. & Admin. News 4655, 4696.

the Cable Act is constitutionally unsound under *Loretto* for the same reasons that Section 53066 is."

In *Loretto*, this Court rejected a New York state statute which authorized cable television companies to place their cable across the rooftops of privately owned multiple dwelling units. This Court found that the statute in *Loretto* was repugnant to the Takings Clause of the United States Constitution: "We affirm the traditional rule that a permanent physical occupation of property is a taking." *Loretto*, 458 U.S. at 441, 73 L.Ed 2d at 886.

At every stage of this proceeding, Mrs. Witteman has asserted the rights she has retained in the backyard property subject to the electricity and telephone easements, and further argued that *Loretto* should apply with full force to those retained rights. The California Court of Appeal distinguished *Loretto* on the ground that there was no easement involved in that case, and apparently never considered the possibility that Petitioner retained any rights in the property subject to the electricity and telephone easements.

2. To the Extent That the Court of Appeal's Decision Was Not Decided on a Federal Ground, It Represents An Attempt to Avoid the Federal Questions Raised by California Government Code § 53066 and by 47 U.S.C. 541(a)(2)

Mrs. Witteman concedes here, as she did below, that the issue of what rights she retained (and what rights she granted) in the land subject to public utility easements is prior in logic to the issue of *Loretto*'s application to those retained rights. In other words, the state law issue of the easements' scope (including their apportionability) is prior to the federal taking issue. Petitioner believes that both issues are intertwined in one federal question. To the extent that they are separate, the Court of Appeal's decision on the state issue is without fair and substantial basis. This is because the Court of Appeal avoided any consideration of the California Supreme Court's earlier decision in *Pasadena v. California-Michigan Land and Water Co.*, holding that the servient tenant to an easement *does retain* significant rights in property subject to public utility easements, including the right to grant subsequent non-interfering easements in or over the property.

a. The Decision of the California Court of Appeals is Directly Contrary to Settled California Law, and has no Fair or Substantial Basis in California Law.

The Court of Appeals held that easements conveyed to public utilities "have been deemed 'exclusive' vis-a-vis their grantors who had no intention to provide utility services . . ." Appendix C at 6.[6] The Appellate Court cites no immediate authority for this, and the decisions on which it relies, (*Salvaty, Hoffman v. Capital Cablevision Systems, Inc.*, 52 App.Div.2d 313, 383 N.Y.S.2d 674 (1976); *Henley v. Continental Cablevision*, 692 S.W.2d 825, 828 (Mo.App., 1985)) all summarily arrived at this conclusion of exclusivity with little or no citation to common law authority.[7] Because the easements are purportedly exclusive, the Court of Appeal reasoned, the easements can be apportioned to as many users as desired, with no power or right in the servient estate owner to object. Appendix C at 11.

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[6] This holding leads to insoluble contradictions. There are two easements in virtually one physical space here, leading to the question of how either can be exclusive. The ad hoc notion of "use exclusivity" poses even greater contradictions.

Assuming that the Appellate Court meant that these easements were exclusive for electricity and telephone service respectively, must we not also apply this strict view to the question of scope? In other words, if one easement was strictly for electrical transmission, and one strictly for telephone lines, then cable would be outside the scope of either easement.

If cable is not outside the scope of one or the other easement, the implication must be that either the electricity or the telephone easement is broad enough to encompass cable. If the easements are then broadly construed, the existence of both of them within essentially the same space *must negate exclusivity*.

[7] As to the common law basis of apportionability, to which no citation is made in the cable cases, see *Chandler v. Hart*, 161 Cal. 405, 416 (1911) (applying the "one stock" test to profit a prendre); *Stanton v. T.L. Herbert & Sons*, 211 S.W. 353, 355 (Tenn., 1919) (profit a prendre not exclusive); *Miller v. Lutheran Conference Center*, 331 Pa. 241, 200 A. 646, 648 (1938) (applying "one stock" test to exclusive easement).

In *Pasadena*, however, the California Supreme Court found that an easement conveyed for public utility purposes was non-exclusive, and that the grantor of the easement *retained the right to grant similar public utility easements to third parties.* 17 Cal. 2d at 578-79. The *Pasadena* easement was created, like the ones here at issue, for a public utility, and in language similar to Petitioner's grant to the City: the Pasadena easement was to be "for the purpose of installing and maintaining water mains and connections thereto." *Id.* at 578.

"This language," the *Pasadena* Court concluded, "*eliminates at once the suggestion that Appellant's easement was a so-called 'exclusive easement'. . . No intention to convey such a complete interest can be imputed to the owner of the servient tenement in the absence of a clear indication of such an intention.*" Id. at 578-79 (emphasis added). Nowhere does the Court in *Pasadena* find any inference of exclusivity because the landowner was not in the public utility water business.

It cannot be questioned that *Pasadena* applies directly to the facts of this case and the rationale of the Court of Appeal.[8] *Pasadena* teaches that, even if Petitioner's right to grant subsequent easements were somehow seen as compatible with the apportionment of the easement in the City's hands, the concept of apportionment is untenable because the easements at issue are not exclusive. (The Court of Appeals itself recognized that exclusivity is the predicate to the apportionment of in gross easements. Appendix C at 5-6.) Nevertheless, the Court of Appeal (and, tacitly, the California Supreme Court) refused even to consider the *Pasadena* case.

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[8] Respondent has attempted to distinguish the *Pasadena* case by noting that it involved water and not electricity, and that it concerned an easement in an unincorporated area of Los Angeles. Neither of these rationales finds any support in the *Pasadena* opinion.

b. There was no Fair or Substantial Basis for the California Court of Appeal's Refusal to Consider the *Pasadena* Case, and thus this Court Is Obligated to Examine State Law for Itself To Determine Whether the Statutes In Question Effect a Taking of Petitioner's Property Rights Without Just Compensation

Petitioner submits that the *Pasadena* holding is controlling here, and that the *failure of the Court of Appeals to even address or distinguish the case* is completely without fair or substantial basis.

This Court has long held that, where the state court refuses to decide the constitutional question, and proffers instead unsubstantial or illusory state grounds, this Court may reexamine the state grounds to determine their adequacy and may then decide the constitutional question. In *Indiana ex. rel. Anderson v. Brand, supra*, this Court held that a state court's interpretation of a contract under its own law could not stand, and must be reexamined as potentially violative of the Constitution. The Indiana Supreme Court had decided that the state's policy regarding contracts with school teachers was to not bind school corporations by contract for more than one year. This Court found that the Indiana Supreme Court's holding was in contravention of its own earlier decisions (303 U.S. at 105-06), and proceeded to address the constitutional issues.

In so ruling, this Court stated: "it has always been held [that] this Court may examine the opinion of the state court to ascertain . . . whether the court rested its judgment on an adequate non-federal ground." Id. at 98-99. While conceding that the decision of the state court is accorded "respectful consideration," the Court in *Anderson* continued:

> [I]n order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what its terms and conditions, and whether the State has, by later legislation, impaired its

> obligation. This involves an appraisal of the statutes of the State and the decisions of its courts.

Id. at 100, 82 L.Ed. at 691; see also *Lawrence v. State Tax Commissioner*, 286 U.S. 276-285, 76 L.Ed. 1102 (1931).

Mrs. Witteman submits that the failure of the California Court of Appeals to even to consider what rights she retained in the subject property, as well as the question of what impact the *Pasadena* case has on the theory of apportionability, makes its opinion fundamentally unfair. We submit that this Court should reappraise the Court of Appeals' decision.

3. The California Appellate Court's Failure to Consider Witteman's Property Rights in the Subject Easements as Established by the California Supreme Court in *Pasadena v. California-Michigan Land and Water Company* Represents an Unpredictable Change in California Property Law, and Thus Itself Effects a Taking of Her Property.

The egregious nature of the Court of Appeals' failure to consider the *Pasadena* case is underscored by former Justice Stewart's examination twenty years ago of a case similar to that at bar.

In *Hughes v. State of Washington*, this Court decided that the Washington Supreme Court's interpretation of Washington state property law, relating to the ownership of land accretions on ocean-front properties, was incorrect. *Hughes v. State of Washington*, 389 U.S. 290, 19 L.Ed. 2d 530, 88 S.Ct. 438 (1967). This Court decided that Mrs. Hughes, and not the state of Washington, was entitled to those accretions under the common law applicable to federal grants such as that to Mrs. Hughes. 389 U.S. at 294.

In a concurring opinion, Justice Stewart opined that the majority should have gone further, and should have decided whether the state had changed the common law. If the state had changed the law applicable to accretions, "Mrs. Hughes may insist, quite apart from the federal origin of her title, that the state may not take her land without just compensation." *Id.* at 295. The state of Washington claimed, and the Washington State Supreme Court

agreed, that Washington law defined all seashore accretions after 1889 as belonging to the state of Washington. To this, Justice Stewart responded:

> To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. *But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.* Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court . . . .

389 U.S. 296-97 (citations omitted) (emphasis added).

Justice Stewart concluded that the Washington State Supreme Court had in fact "worked an unpredictable change in state law." *Id.* at 297. Twenty years previous to the Washington State Supreme Court's ruling in *Hughes*, that same Court had ruled that "title to gradual accretions under Washington law vested in the owner of the adjoining land." *Id.* (citation omitted).

Justice Stewart's analysis of this sudden change in Washington law applies to the Court of Appeal's apparent negation in the instant case of Mrs. Witteman's right to transfer subsequent non-interfering easements across her backyard to third parties, and of her right to object to use of the existing easements by parties unrelated to the original grantees:

> The beach [Mrs. Hughes] had every reason to regard as hers was declared by the state court to be in the public domain. Of course the court did not conceive of this action as a taking. As is so often the case when a State exercises its power to make law, or to regulate, or to pursue a public project, pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a State says, or by what it intends, but

> by what it *does*. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment.

398 U.S. at 397-98.

Here, Mrs. Witteman's situation is similar to that of Mrs. Hughes: the state has taken her property and declared it *ipse dixit* to be in the public domain;[9] and the California Court of Appeals has sanctioned this result by asserting retroactively—and directly contrary to applicable precedent (as described above)—that the property rights taken by the cable company under state authority never belonged to Mrs. Witteman. Petitioner submits that this Court should not be party to California's confiscation of Mrs. Witteman's property without compensation, even if such taking was for a "public project," and without any calculated decision to deprive Mrs. Witteman of her property. Certiorari should be granted.

B. Why It Matters

1. Under the Court of Appeal's Decision, Mrs. Witteman Loses Significant Property Rights

If the California Court of Appeal's decision is allowed to stand, the result is that Petitioner's backyard easements will be construed as endlessly apportionable in the hands of either the City or General. In addition to losing her right to grant subsequent, non-interfering easements to third parties, Mrs. Witteman will have no

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[9] The State has then, in effect, taken its newly acquired property and "apportioned" it to a private enterprise. Witteman contends that this also offends the Constitution because the taking is not for a public purpose.

power to exclude an as yet undetermined number of uninvited "guests" from her property.

This Court made clear in *Loretto* that cable's statutorily mandated presence over private property does not simply take a single 'strand' from the bundle of property rights: it chops through the bundle taking a slice of every strand." 458 U.S. at 435, 102 S. Ct at 3164. One of those rights is the power to exclude. "The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Id.*, citing *Kaiser Aetna v. United States*, 444 U.S. 164, 179-180 (1979).

Nor is Petitioner complaining only of the occupation of her land by the cable itself. Under California property law, the cable television company obtains with its easement a "secondary easement" for ingress and egress on the property. *See, e.g., Anderson v. Southern California Edison Co.*, 77 Cal. App. 328, 335 (1926). Thus, Petitioner will be saddled with the forced entry of service personnel onto her property for all the foreseeable future. In the vernacular, there is a new player in Mrs. Witteman's backyard.

Moreover, under this Court's decision in *Preferred Communications v. City of Los Angeles*, ____ U.S. ____, 90 L.Ed.2d 480, 106 S. Ct. 2034 (1986), Petitioner may well be visited not only by the service personnel (and equipment) of one cable company, but by the personnel and equipment of as many companies as think they can make a profit in Petitioner's neighborhood. The Court in *Preferred* strongly suggested that municipalities may not constitutionally limit the provision of cable services to one franchise. 106 S. Ct. at 2037-38.

Finally, the decision to allow the cable television industry, which has vigorously and consistently resisted both the obligations and characterization of a public utility, to now use public utility easements, is a disservice to the public, a usurpation of a limited public resource (inasmuch as it is public) for private benefit, and in itself a violation of the scope of the easements as originally granted (as Petitioner separately argued below). *Cf.* Noam, "Towards an Integrated Communications Market: Overcoming the Local Monopoly of Cable Television," 34.2 Fed'l Communi-

cations L.J. 21 (1982); I. Pool, *Technologies of Freedom*, 169-74 (1983). Cable television does not provide the universal and democratic access traditionally provided by common carrier public utilities,[10] nor is it rate-regulated as are public utilities.

2. Recent Decisions of This Court Support Petitioner's Contention that her Property Has Been Taken Without Just Compensation

In a recent decision, the United States Supreme Court reaffirmed the principles of *Loretto*. *Federal Communications Commission v. Florida Power Corporation*, ____ U.S. ____, 107 S.Ct 1107 (1987). The Court there addressed the claim that the federal Pole Attachments Act worked a taking of the power company's property by authorizing the F.C.C. to set the pole rental fees paid by cable companies at a (presumably) below-market level. 107 S.Ct. at 1110-11. The Court rejected this claim, noting that

> nothing in the Pole Attachments Act as interpreted by the FCC in these cases gives cable companies any right to occupy space on utility poles, or prohibits utility companies from refusing to enter into attachment agreements with cable operators.

Id. at 1112. Thus, the Florida Power's situation was plainly different from Mrs. Loretto's. "[The statute in] *Loretto* specifically *required* landlords to permit permanent occupation of their property by cable companies." *Id.* (emphasis in original).

"This element of required acquiescence," this Court stated, "is at the heart of the concept of occupation." *Id.* The Court then quoted from *Loretto*:

> "[P]roperty law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury.

Id.

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[10] The 1984 Cable Act specifically provides that cable is not to be treated as a common carrier, 47 U.S.C. 541 (c).

It is undisputed in the instant case that Witteman never invited Respondent onto her property. (In fact, even Respondent's evidence indicates that she objected immediately.) She has been required, against her will, to acquiesce to the presence of the cable company on her property. This is precisely the taking of rights proscribed by *Loretto* and *Florida Power*. Respondent's assertion that the grant of Mrs. Witteman's predecessor to the City for electrical energy almost 60 years ago constitutes an invitation to all subsequent would-be users is a measure of the desperation of the cable industry's position.

Indeed, the California Supreme Court has recognized that the servient property owner is entitled to "compensation for the appropriation of an easement, which is unquestionably compensable 'property' under Article 1, Section 14 of the California Constitution. *Southern California Edison Co. v. Bourgerie*, 9 Cal. 3d 169, 172, 107 Cal. Rptr. 76 (1973); *see also Los Angeles v. Howard*, 244 Cal. App. 2d 538, 549, 53 Cal. Rptr. 538 (1966) ("restrictions herein sought to be imposed on [servient landowner] without legal basis and without compensation are matters which [City of Los Angeles and Department of Water and Power]—if their need is as great as they would have us believe—can secure by negotiation or by exercise of their power of eminent domain"); *Western Union Telegraph Co. v. Pennsylvania Railroad Co.*, 195 U.S. 540 (1904) (Court assumes that invasion of telegraph lines into railroad right of way would be compensable taking); and other cases cited in *Loretto*, 458 U.S. at 430; *see also, Texas Power & Light v. F.C.C.*, 784 F.2d 1265, 1273 (5th Cir. 1986) ("Both [power company and cable company] agree that, should land owners become aware of their rights, they might demand payment from the cable company for use of these 'air rights' ").

The *Loretto* rule that even a minimal physical occupation of property constitutes a taking has been approved in every recent "takings" decision by this Court. *Keystone Bituminous Coal Association v. DeBenedictus*, ____ U.S. ____, 107 S.Ct. 1232, 1244, n.18 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, ____ U.S. ____, 107 S.Ct. 2378, 2393

(1987) (Justices Stevens, Blackmun, and O'Connor, dissenting in part); *Nollan v. California Coastal Commission*, ____ U.S. ____, 107 S.Ct. 3141, 3145 (1987). In *Nollan*, the Court applied *Loretto* to a situation in which beach users in the area adjoining a public beach were given an easement to walk along the ocean at the rear of Mr. Nollan's property. The Court in *Nollan* emphasized the holding in *Loretto* that "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property,' " and held that the public's permanent passing to and fro constituted a "permanent physical occupation" under *Loretto*. 107 S.Ct at 345 (citations omitted).

Mrs. Witteman submits that the "taking" of her property is more egregious than that in *Nollan*. Not only is her property now permanently invaded by at least one physical object (the cable), but she is also permanently subject to the unannounced ingress and egress by cable personnel from the street to the power poles at the rear of her property. In contrast to Nollan's backyard in the neighborhood of traditionally public recreation areas, Mrs. Witteman's backyard is a private place, hitherto reserved for the exclusive use of her family.

3. Both Courts and Commentators Have Recognized the Contradictions in the Use of Public Utility Easements by Private Cable Companies

Courts are beginning to acknowledge the contradictions inherent in cable's use of public utility easements. An Illinois Appellate Court held in 1982 that easements reserved for gas, electric and telephone services were not available to private cable companies. *Consolidated Cable Utilities v. City of Aurora*, 439 N.E.2d 1272 (1982). The court there found, where "the easement is reserved for gas, electric and telephone service, the plain meaning of the reservation does not also include other unnamed services." *Id.* at 1276.

In 1985, the Florida State Court of Appeal addressed the same issue:

> [I]f cable television is not a public utility, then its use of this easement and entry upon homeowners' land is trespass which should have been declared and enjoined.

Devon-Aire Villas Homeowners Association v. Americable Associates, 10 F.L.W. 2786 (1985). After a careful review of the nature and characteristics of cable television and public utilities, the court in *Devon-Aire* concluded that cable, at the present time, is not a public utility and, *a fortiori*, should not be allowed to use public utility easements. *Id.*

Over fifteen years ago, a member of the very legislature which passed Section 53066 into law declared that Section 53066 could not permit cable companies to trespass on a homeowner's property. The Honorable George Danielson, former chairman of the California State Senate Public Utilities and Corporations Committee (in addition to serving in both the United States House of Representatives and the California Assembly), and presently a Justice of the California Court of Appeals, concluded in a 1971 law review article that "Section 53066 would not be construed as authorizing a local government to make use of public utility easement over private property . . . for purposes inconsistent with public utility use." Danielson and Wheeler, "The Status of the Cable Antenna Television Industry and Proposal for State Regulation," 2 Pac. L.J. 528, 571 (1971). Danielson further stated that

> [I]t would appear that the cable television systems authorized to use public utility easements over public and private property . . . *have been trespassing upon the property* . . . [I]t seems that every servient property owner with a public utility easement . . . would have a right of action for damages against both the local government and any CATV operator using the easement.

Id. at 570-571.

If private cable companies are not public utilities (and perhaps even if they are), they should pay for the right to pass over, and enter upon, private property.

4. A Decision for Petitioner Is Not a Decision Against Cable Television

If this Court finds, as we submit it should, that its earlier decision in *Loretto* applies to this case, the California cable industry is not going to grind to a halt. It did not happen after *Loretto*; it will not happen now.

After this Court held that New York cable television companies could no longer use apartment rooftops without compensating the apartment owners, it remanded the case for a determination of just compensation for the taking. 458 U.S. at 442. On remand, the New York Court of Appeals sent the case to the New York State Commission on Cable Television for that determination. *Loretto v. Teleprompter Manhattan CATV Corp.*, 58 N.Y.2d 143, 146 N.E.2d 428 (1983). The Commission then reportedly established a rebuttable assumption that each property owner was entitled to nominal compensation of one dollar ($1.00). Amicus Riviera Homeowners Association has suggested that such an administrative body or eminent domain proceeding could serve several purposes: it could provide for compensation of the underlying property owner; it could provide a forum to consider how the installation and servicing of the cable could be done in the least intrusive manner possible; and it would eliminate the problem of the "recalcitrant homeowner."

Whether one dollar is just compensation, and whether the New York State Commission was the proper body to make this decision, remains unclear. What is clear is that the cable industry will not be disabled by the application of *Loretto* here.

VI.

CONCLUSION

The Court of Appeal's position (or lack of a position) regarding Mrs. Witteman's property rights is contrary to clear and express California law, as well as to the whole common law of easements. Such a holding does enormous damage, not only to Petitioner's settled expectations concerning her property rights, but also to the integrity of every easement grant in California, if not the nation.

A ruling in favor of the status quo would also put this Court's seal of approval on a very unfair bargain: the cable industry would receive vested rights to a valuable public resource, while the industry renounces at the same time any of the obligations and responsibilities to the public normally connected with the use of that resource.

The decision of the California Court of Appeals should be reversed, and the case remanded for further proceedings not inconsistent with this Court's opinion.

DATED: December 2, 1987

Respectfully submitted,

MATTHEW H. WITTEMAN
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Attorneys for Appellant
Mrs. Mary M. Witteman

Appendix A

47 U.S.C.

§ 541. General franchise requirements

(a) Authority to award franchises; construction of cable systems over rights-of-way and through easements; conditions for use of easements; equal access to service

(1) A franchising authority may award, in accordance with the provisions of this subchapter 1 or more franchises within its jurisdiction.

(2) Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses, except that in using such easements the cable operator shall ensure—

(A) that the safety, functioning, and appearance of the property and the convenience and safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;

(B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and

(C) that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.

. . .

(c) Status of cable system as common carrier or utility

Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.

Appendix B

CALIFORNIA GOVERNMENT CODE

§ 53066. Community antenna television system; franchise or license; rules and regulations

Any city or county or city and county in the State of California may, pursuant to such provisions as may be prescribed by its governing body, authorize by franchise or license the construction of a community antenna television system. In connection therewith, the governing body may prescribe such rules and regulations as it deems advisable to protect the individual subscribers to the services of such community antenna television system. The award of the franchise or license may be made on the basis of quality of service, rates to the subscriber, income to the city, county or city and county, experience and financial responsibility of the applicant plus any other consideration that will safeguard the local public interest, rather than a cash auction bid. The maximum franchise fee for any franchise or license hereafter awarded pursuant to this section or pursuant to any ordinance adopted under authority of this section by any city or county or city and county shall be 5 percent of the grantee's gross receipts from its operations within such city or county or city and county. Any cable television franchise or license awarded by a city or county or city and county pursuant to this section may authorize the grantee thereof to place wires, conduits and appurtenances for the community antenna television system along or across such public streets, highways, alleys, public properties, or public easements of said city or county or city and county. Public easements, as used in this section, shall include but shall not be limited to any easement created by dedication to the city or county or city and county for public utility purposes or any other purpose whatsoever.

(Added by Stats.1963, c. 2087, p. 4351, § 1. Amended by Stats.1968, c. 172, p. 396, § 1. Subsequently amended by Stats. 1983, c. 1142, p. ___, § 1, but amendment does not relate to easement use, and statute was in form printed here when Respondent cable company entered on Petitioner's property.)

Appendix C

[No. B016024. Second Dist., Div. One. July 29, 1986.]

MARY M. WITTEMAN, Plaintiff and Appellant, v. JACK BARRY CABLE TV, Defendant and Respondent.

Opinion

HANSON (Thaxton), J.—On this appeal, we consider the circumstances under which cable television companies must obtain the consent of real property owners before extending their transmission lines across the owners' land. The issue is of importance to the cable television industry.[1]

This litigation arose when plaintiff Mary M. Witteman, as an individual and on behalf of "all others similarly situated" brought an action for trespass to real property. Named as defendants were General Telephone Company of California (General Telephone) and Jack Barry Cable TV (Barry). By first amended complaint, plaintiff stated two causes of action, seeking damages for trespass and alleging the need for injunctive relief.

After discovery but before class certification, defendants moved separately for summary judgment. The trial court awarded summary judgment to each of them.[2] Plaintiff has appealed from the summary judgment awarded to defendant Barry. As we shall explain, we affirm the judgment entered below.

The Notice of Appeal

On June 26, 1985, the trial court issued a minute order awarding summary judgment to defendant Barry and instructing defendant to prepare a judgment. On July 18, 1985, the trial judge signed the judgment and it was filed. On August 21, 1985,

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[1] On April 16, 1986, this court granted the request of the California Cable Television Association (CCTA) to file an amicus curiae brief in the case at bench. The brief was filed May 30, 1986.

[2] Summary judgment was awarded General Telephone on February 15, 1985. Another appeal is apparently pending, but the matter before us concerns only the cable television company, Barry.

plaintiff filed a notice of appeal, appealing from "the judgment in favor of Jack Barry Cable TV upon its Motion for Summary Adjudication entered June 26, 1985, in the Minutes . . . [of the trial court]." The appeal was timely, but the notice referred to the wrong order, the minute order rather than the subsequently entered judgment. We construe the notice as if taken from the judgment, and review the appeal on the merits. (See 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 375, p. 378.)

Standard of Review

Code of Civil Procedure section 437c, subdivision (c), provides for granting a summary judgment motion "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (1) In reviewing the trial court's disposition of such a motion, we employ the standard described with particularity in *Stationers Corp. v. Dun & Bradstreet, Inc.* (1965) 62 Cal.2d 412, 418 [42 Cal.Rptr. 449, 398 P.2d 785], which compels strict construction of affidavits and other materials offered by the moving party in the trial court and liberal construction of similar documents submitted in opposition to the summary judgment motion. In the case at bench, plaintiff failed to file timely opposition to defendant Barry's summary judgment motion, and thus there are no opposition affidavits to construe. However, it appears that the facts which gave rise to this dispute are substantially uncontroverted, and the determination of whether plaintiff has stated a cause of action is one of law.

Factual Summary

On appeal, each party prepared an appendix in lieu of clerk's transcript, as permitted by Rule 5.1, California Rules of Court. From the record as thus constituted, including documents of which judicial notice has been taken, we have ascertained the following facts.

Plaintiff acquired a fee simple interest in a lot and a residence located at 8135 Delgany Avenue, Playa del Rey, in 1958. At the time of acquisition, the property was subject to two easements.

The first easement had been acquired by the City of Los Angeles (City) in 1929 from a predecessor in interest to plaintiff. The deed to the City recited that City had a permanent easement and right-of-way "to construct, reconstruct, maintain and operate lines of poles and wires and conduits and other necessary fixtures for the transmission of electrical energy over and across" the rear four feet of plaintiff's property. "TO HAVE AND TO HOLD . . . unto said The City of Los Angeles, its successors and assigns forever." In 1978 the City enacted Los Angeles Ordinance No. 151,016, granting defendant Barry a cable television franchise covering a portion of the City which includes plaintiff's property. Pursuant to this same ordinance, the City permitted Barry to use the City's easement over plaintiff's property to install and maintain its cable television equipment.

The second easement was created in 1957, when plaintiff's predecessor in interest quitclaimed to General Telephone an easement over the rear five feet of plaintiff's property, the General Telephone easement. Its purpose was for "constructing, adding to, maintaining, removing and repairing . . . pole lines . . . for the transmission of electrical energy and for telephone lines"; the quitclaim was "expressly contingent upon . . . record ownership of a reserved easement in the Grantors, and [is] subject to any and all easements and rights of way heretofore remised . . . by Grantors . . ."

When plaintiff acquired title to the real property in 1958, the deed to her included a specific reservation with respect to the General Telephone easement over the rear five feet; the reservation, however, permitted plaintiff to utilize the surface of the rear five feet "provided such use does not interfere with the installation, operation, or maintenance of the . . . utilities" in the easement.

In July 1979, General Telephone and Barry entered into a pole lease agreement whereby General Telephone, as licensor, granted licensee Barry permission to attach its cable television wires to General Telephone's poles in return for a rental fee for each pole. The agreement required Barry to "submit evidence satisfactory to Licensor of its authority to erect and maintain its equipment within public streets, highways and other thoroughfares and [to]

secure any necessary license, permit or consent from Federal, State or Municipal authorities and from the owners of property now or hereafter required to construct and maintain such equipment at the location of poles of Licensor to which it desires to attach."

Subsequent to this agreement, Barry strung a cable wire across plaintiff's property and attached it to General Telephone poles located on the properties of adjacent landowners. According to the affidavit of Wayne L. Hanson, a licensed California land surveyor, the wire in question was within inches of the rear property line and well within both the four-foot City easement and the five-foot General Telephone easement. The wire was but one of numerous wires crossing plaintiff's property and attached to General Telephone's poles.

In 1982, the United States Supreme Court issued an opinion in *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419 [73 L.Ed.2d 868, 102 S.Ct. 3164], holding that a New York statute requiring the nonconsenting owner of real property to permit installation of cable television facilities thereon constituted a taking of private property without compensation, prohibited by the United States Constitution.

The New York statute did not utilize public easements as does our state statute, Government Code section 53066, in obtaining access for cable television facilities from homeowners. *Loretto* did not express any opinion about such utilization but characterized its ruling as a narrow one; the court stated that, "We affirm the traditional rule that a permanent physical occupation of property is a taking." (*Id.*, at p. 441 [73 L.Ed.2d at p. 886].)

Plaintiff commenced this litigation in reliance, at least in part, on *Loretto*, contending that Barry had installed the cable wire over her property without obtaining her consent. Plaintiff sought monetary damages due to the claimed dimunition of the value of her property as the result of the trespass and injunctive relief to compel Barry to remove the cable wire. The summary judgments were granted to the defendants and this appeal followed.

Discussion

While this litigation was pending in the trial court, another division of this court considered a similar appeal from homeowners who claimed they had not consented to the installation of a cable television wire across their property, a wire installed with the permission of a telephone company possessing an easement thereon, and within the easement.

In *Salvaty v. Falcon Cable Television* (1985) 165 Cal.App.3d 798 [212 Cal.Rptr. 31], the Court of Appeal decided that the homeowners' second amended complaint against the cable television company and the telephone company had been properly dismissed below. It was held that the homeowners' consent was not required before cable television equipment could be installed on a telephone pole situated on the homeowners' property because the cable equipment use was "within the scope of the easement which the telephone company apportioned to the cable company." (*Id.*, at p. 799.) The *Salvaty* court noted that public policy strongly favored the expansion of cable television services to the public; this policy had been expressed by the Legislature when it enacted emergency legislation in 1980 (Pub. Util. Code, § 767.5) regulating the circumstances under which public utilities make available surplus space and excess capacity on poles and other equipment to cable television companies. (*Id.*, at pp. 801-802.)

Salvaty also relied on a New York decision, *Hoffman v. Capitol Cablevison Systems, Inc.* (1976) 52 App.Div.2d 313 [383 N.Y.S.2d 674], which had analyzed the nature of certain similar public utility easements and had turned to the legal principles set forth in 5 Restatement of the Law, Property, section 493, particularly subdivisions (c) and (d). *Hoffman* ascertained that such easements were easements in gross, exclusive vis-à-vis the grantor, and thus apportionable. *Salvaty* adopted the same reasoning and approach and also approved *Hoffman* for emphasizing that the cable equipment in question "would not impose an additional burden on the servient tenement; was consistent with the policy of broadly interpreting easements to meet progressive inventions; and that cable television rendered a valuable educational and

public service." The *Loretto* decision was distinguished on the basis that it did not involve an easement. (*Id.*, at pp. 804-805.)

We note that in California easements involving the right-of-way have been considered "easements in gross" since 1872. (See Civ. Code, § 802.) (2) They are, in other words, property rights which are not attached to any particular land as the *dominant* tenement (the holder of which has the right to the easement) but do create a *servient* tenement, a burden on the land upon which the easement has been granted. Easements conveyed to public utilities are in the same category. They have been deemed "exclusive" vis-à-vis their grantors who had no intention to provide utility services, and no management or control rights concerning the utility's easement use. This factor, in turn, has led to the conclusion of apportionability, without obtaining any consent of the holder of the servient estate—in these cases, the homeowners.

On this appeal, plaintiff Witteman makes several arguments seeking to distinguish *Salvaty* or to persuade us that it was wrongly decided. In addition, plaintiff addresses some broad public policy issues with respect to cable television and the industry in general. We shall briefly discuss the contentions made.

I.

Plaintiff contends that *Salvaty* is distinguishable from the case at bench and that its holding should not be applied. The argument is without merit.

(3) Plaintiff suggests that the fact that the instant case involved two easements rather than one renders it distinguishable from *Salvaty*. It is a distinction without a difference. Plaintiff argues that the fact that two easements are involved negates the characterization of them as "exclusive," and thus also negates apportionability. Plaintiff, however, assigns a different meaning to the term "exclusive" than that employed in the decisional law which has considered cable television's use of public utility easements. In *Henley v. Continental Cablevision* (Mo.App. 1985) 692 S.W.2d 825, 828, the Missouri court discussed a situation where two public utility easements coexisted on the

same land. Rejecting the argument of nonexclusivity, the court stated that "Thus, insofar as it related to the apportionability of an easement in gross, the term 'exclusive' *refers to the exclusion of the owner and possessor of the servient tenement from participation in the rights granted,* not to the number of different easements in and over the same land." (Italics added.)

The fact that there are two easements involved in the instant case merely broadens the inquiry from traditional real property rules to specific, independent grounds for affirming each easement's apportionability. Defendant Barry sought and received the permission of *both* City and General Telephone before installing its cable transmission wire. With respect to the City's easement, Government Code section 53066 provides, in pertinent part: "Any city or county or city and county in the State of California may, pursuant to such provisions as may be prescribed by its governing body, authorize by franchise or license the construction of a community antenna television system. In connection therewith, the governing body may prescribe such rules and regulations as it deems advisable to protect the individual subscribers to the services of such community antenna television system. The award of the franchise or license may be made on the basis of quality of service, rates to the subscriber, income to the city, county or city and county, experience and financial responsibility of the applicant plus any other consideration that will safeguard the local public interest, rather than a cash auction bid. . . . *Any cable television franchise or license awarded by a city or county or city and county pursuant to this section may authorize the grantee thereof to place wires, conduits and appurtenances for the community antenna television system along or across such public streets, highways, alleys, public properties, or public easements of said city or county or city and county. Public easements, as used in this section, shall include but shall not be limited to any easement created by dedication to the city or county or city and county for public utility purposes or any other purposes whatsoever.*" (Italics added.) This section was enacted in 1963, and has been amended from time to time since without materially altering the maint thrust of the legislation. It demonstrates legislative recognition of the importance of *public* easements to the cable television industry and specifically authorizes the type of appor-

tionability City has adopted in extending franchise rights to cable television companies such as Barry.

With respect to the General Telephone easement, it was created long after the City easement, included an extra foot, and by its language contemplated underground installations as well as surface installations. Statutory authority for characterizing it as apportionable is found in Public Utilities Code section 767.5, which clearly views apportionment of surplus space and excess capacity for pole attachments as a public utility *service* delivered by public utilities to cable television corporations. While *Salvaty* did not expressly rely on either Government Code section 53066 or Public Utilities Code section 767.5, basing its decision on basic traditional real property law, these statutes afford additional ground for recognizing apportionability and reflect the legislative understanding of the common law rules and their applicability to the expansion of cable television services.

Another important aspect of the *Salvaty* holding was its response to the argument that cable television equipment was not within the scope of the easement therein because the easement's use was limited to telephone and electric light and power transmission. *Salvaty* characterized the addition of cable television transmission as "part of the natural evolution of communications technology." (*Salvaty v. Falcon Cable Television, supra,* 165 Cal.App.3d 798, 803; and see *Faus v. City of Los Angeles* (1967) 67 Cal.2d 350, 355-358 [62 Cal.Rptr. 193, 431 P.2d 849].) The observation of the *Henley* court is also pertinent here: "The unsurprising fact that the drafters of the 1922 easements did not envision cable television does not mandate the narrow interpretation of the purposes of the conveyance of rights and privileges urged by plaintiffs. The expressed intention of the predecessors of plaintiff trustees was to obtain for the homeowners in the subdivision the benefits of electric power and telephonic communications. Scientific and technological progress over the ensuing years [has] added an unforeseen dimension to such contemplated benefits, the transmission by electric impulse of visual and audio communication over coaxial cable. It is an inescapable conclusion that the intention of plaintiffs' predecessors was the acquistion and continued maintenance of available means of bringing electri-

cal power and communication into the homes of the subdivision. Clearly, it is in the public interest to use the facilities already installed for the purpose of carrying out this intention to provide the most economically feasible and least environmentally damaging vehicle for installing cable systems." (*Henley v. Continental Cablevision, supra,* 692 S.W.2d 825, 829.)

We conclude that the reasoning of *Salvaty* is sound. There are now a substantial number of cases in other jurisdictions which have reached similar results: *Hoffman, supra; Henley, supra; Jolliff v. Hardin Cable Television Co.* (1971) 26 Ohio St.2d 103 [55 Ohio Ops.2d 203, 269 N.E.2d 588]; see also *Clark v. El Paso Cablevision, Inc.* (Tex.Civ.App. 1971) 475 S.W.2d 575. The appellants in *Salvaty* were denied review by the California Supreme Court on May 15, 1985.[3]

II.

(4a) Plaintiff also contends that the summary judgment in this action must be reversed because the issues of appropriate interpretation of the easements and the burden to the homeowners involve questions of fact, rather than law, and can only be resolved by further proceedings in the trial court. Defendants argue that the language of the easements was sufficiently broad to cover the use in which it is currently engaged, and further, that the scope of the easements encompasses normal technological evolution as a matter of law.

(5) While we agree with defendants' position in this regard, we point out also that the *interpretation of writings,* such as deeds granting easements, is essentially a question of law, when no extrinsic evidence has been admitted concerning the meaning of

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[3] Plaintiff has cited two cases in which appellate courts have reached the opposite conclusion: *Consol. Cable Utilities v. City of Aurora* (1982) 108 Ill.App.3d 1035 [439 N.E.2d 1272] and *Devon-Aire Villas Homeowners Ass'n No. 4, Inc. v. Americable Associates, Ltd.* (Fla.App. 1985) 10 F.L.W. 2786, rehg. den., motion den. (Fla.App. 1986) 11 F.L.W. 482. We recognize the fact that there are differing opinions on the rights and responsibilities that should govern the expansion of cable television facilities.

the writings. An appellate court exercises an independent function of review in such situations. (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 292 et seq., pp. 303-306.) (4b) In the case at bench, no extrinsic evidence was offered by way of opposition to the summary judgment motion, in the form of affidavits or other materials, to persuade the trial court to make the narrow interpretation of the deeds in question plaintiff supports.

III.

Plaintiff's brief contains, finally, a number of arguments directed toward public policy considerations that might be material in a political debate about the amount of governmental regulation necessary or otherwise with respect to the cable television industry, but are immaterial to this appeal.

The thrust of plaintiff's argument appears to be that the cable television industry consists of private enterprises benefitting from the services extended by governmentally regulated public utilities—without acquiring the status of public utilities themselves—and that the industry's resistance to regulation is not only a historical fact but opens the door to various kinds of abuse.

As important and far-reaching as these concerns are, they are immaterial to our decision here, and many of them are more appropriately addressed to our Legislature or to Congress.

Plaintiff also relies on the issues raised in *Pref. Communications v. City of Los Angeles, Cal.* (9th Cir. 1985) 754 F.2d 1396 concerning the extent to which municipalities can restrict access to cable facilities and observe rights guaranteed by the First Amendment of the United States Constitution. It is argued that if the right to restrict access is constitutionally limited, homeowners may well be faced in the future with a myriad of competing cable television wires rather than the one wire under consideration here. The *Preferred* case has now been remanded by the United States Supreme Court for the development of more facts. (*City of Los Angeles and Dept. of Water and Power v. Preferred Communications, Inc.* (1986) ____ U.S. ____ [90 L.Ed.2d 480, 106 S.Ct. 2034].) There are no facts before us that necessitate a response to plaintiff's speculative projection.

In summary, apportionment of use to defendant Barry by the holders of the easements involved in the present case, without the consent of the homeowner-possessor of the servient tenement, is supported by basic real property law principles, present statutory law, and a growing body of decisional law.

DISPOSITION

The judgment is affirmed.

Spencer, P. J., and Epstein, J.,* concurred.

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* Assigned by the Chairperson of the Judicial Council.

Appendix D

No. L.A. 32277

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

WITTEMAN

v.

JACK BARRY CABLE T.V.

Pursuant to rule 29.4 (c), California Rules of Court, review is DISMISSED and the cause is remanded to the Court of Appeal, Second Appellate District, Division One.

LUCAS
Chief Justice

PANELLI
Associate Justice

ARGUELLES
Associate Justice

EAGLESON
Associate Justice

Associate Justice

Associate Justice

Associate Justice

Supreme Court
Filed:
September 3, 1987
Lawrence P. Gill, Clerk

Petitioner notes that Justices Lucas, Mosk, Bird, and Reynoso had voted for review in November, 1986.

Supreme Court, U.S.
FILED
DEC 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-936

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1987

MARY M. WITTEMAN,
Petitioner,

VS.

JACK BARRY CABLE TV,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE SECOND APPELLATE DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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List of Corporate Parties, Parents, Subsidiaries and affiliates as required by Rule 28.1:

American Cablesystems Corporation
American Cablesystems of California, Inc.
Continental Cablevision, Inc.

TABLE OF CONTENTS

	Page
SUMMARY OF ARGUMENT	1
STATEMENT OF THE FACTS	3
REASONS WHY THE PETITION SHOULD BE DENIED	5
A. The California Court Of Appeal Decision Rested on Independent and Adequate State Ground	5
B. The Court of Appeal Decision Had A Fair and Substantial Basis Under California Law	7
C. Petitioner Cannot Create Jurisdiction by Claiming That the Court of Appeal's Decision by Itself Constitutes a "Taking"	14
CONCLUSION	15

TABLE OF AUTHORITIES

Cases

	Page
Broad River Power Co. v. State of South Carolina, 281 U.S. 537, 50 S. Ct. 401, 74 L. Ed 1023 (1930) ...	7
Clark v. El Paso Cablevision, 475 S.W. 2d 575 (Tex. Civ. App. 1971)	9
Fox Film Corp. v. Muller, 296 U.S. 207, 56 S. Ct. 183, 80 L. Ed. 158 (1935)	5
Henley v. Continental Cablevision, 692 S.W. 2d 825 (Mo. Ct. App. 1985)	9
Hoffman v. Capitol Cablevision Systems, 383 N.Y.S.2d 674, 52 App. Div. 2d 313 (1976)	8, 9
Michigan v. Long, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983)	5
Munn v. Illinois, 94 U.S. 113, 24 L. Ed. 87 (1877)	14
Pasadena v. California-Michigan Land & Water Co., 17 Cal. 2d 576, 110 P.2d 983 (1941)	10, 11, 12, 13
PruneYard Shopping Center v. Robins, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed 741 (1980)	14
Robins v. PruneYard Shopping Center, 23 Cal. 3d 899, 153 Cal.Rptr. 854, 592 P.2d 341 (1979)	14
Russell v. Southard, 53 U.S. (12 How.) 139, 13 L.Ed. 927 (1851)	4
Salvaty v. Falcon Cable Television, 165 Cal. App. 3d 798, 212 Cal.Rptr. 31 (1985)	8
State ex rel. Anderson v. Brand, 303 U.S. 95, 58 S. Ct. 443, 82 L. Ed. 685 (1938)	5
Witteman v. Jack Barry Cable TV, 183 Cal. App. 3d 1001, 228 Cal.Rptr. 584 (1986)	passim

TABLE OF AUTHORITIES

Constitution, Statutes and Regulations

	Page
47 U.S.C. § 541(a)(2)	2
California Constitution, Art. 11, § 19	13
California Government Code § 53066	2
California Public Utilities Commission, General Order No. 95	13
Charter of the City of Los Angeles, Art. XXII, § 220(1)	13

Other Authorities

5 *Restatement of Property*, § 493 comment c (1944)	9, 12
R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice* (6th Ed. 1978)	5

No. 87-936

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MARY M. WITTEMAN,
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ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE SECOND APPELLATE DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

No basis of jurisdiction exists for granting the Petition for Writ of Certiorari ("Writ Petition") filed by Petitioner Mary Witteman ("Petitioner"). Petitioner originally sued Respondent Jack Barry Cable TV ("Respondent") for trespass, claiming that the apportionment to Respondent of the right to utilize easements located at the rear of Petitioner's backyard was contrary to law. Respondent successfully moved for summary judgment, arguing solely that the easements were properly apportionable to Respondent under common law principles.

On appeal, the primary arguments of both parties continued to focus on whether the easements were properly apportionable to Barry at common law. Petitioner

also argued, however, for the first time, that if apportionment was *not* permitted at common law, then California Government Code § 53066 (which also permits apportionment) was unconstitutional.[1] The California Court of Appeal agreed with Respondent that California common law permitted the easements to be apportioned, and neither reached nor discussed the constitutionality of Government Code § 53066. Because the Court of Appeal's decision rested upon an adequate and independent state ground, this Court does not have jurisdiction to decide the intricate details of California property law presented by this case.

Even Petitioner agrees that the state property law question of the apportionability of in gross easements is independent of ("prior to") any federal "takings" question. Writ Petition at 9. Petitioner, however, contends that this Court should review the Court of Appeal's decision on the ground that no fair and substantial basis exists for its determination of California common law principles. This argument ignores the fact that the decision of the California Court of Appeal is completely consistent with and heavily relies upon other California authorities *and* is consistent with the vast majority of other states' opinions dealing with this same issue. Petitioner's complaint that no "fair and substantial" basis

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[1]Petitioner now argues that the Court of Appeal's reliance on common law grounds somehow "[r]epresents [a]n [a]ttempt to [a]void the [f]ederal [q]uestions [r]aised by California Government Code § 53066 and by 47 U.S.C. 541(a)(2)." Writ Petition at 9. This stands on its head the argument in the California Court of Appeal, where the briefs of both parties primarily discussed the propriety of apportionment at common law. Indeed, 47 U.S.C. § 541(a)(2) was mentioned only once, in passing, in Petitioner's Opening Brief in the California Court of Appeal, and not at all in her Reply Brief in that court.

exists for the Court of Appeal's holding thus reduces to the fact that she disagrees with the ruling.

STATEMENT OF THE FACTS[2]

In 1929, one of Petitioner's predecessors-in-interest granted to the City of Los Angeles ("the City"), and its successors and assigns, the permanent easement and right of way "to construct, reconstruct, maintain and operate" poles, lines and fixtures for the transmission of electrical energy over and across the rear four feet of Petitioner's property (the "1929 City Easement"). In 1978, the City enacted Los Angeles Ordinance 151,016 whereby it granted Respondent a cable television franchise covering a portion of the City which includes Petitioner's property. Ordinance 151,016 permits Respondent to use, among others, the 1929 City Easement to install and maintain its cable television wire.

In 1957, another of Petitioner's predecessors-in-interest quitclaimed to General Telephone Company of California ("GTC"), and its successors and assigns, an easement (the "1957 GTC Quitclaim Easement") over the rear five feet of Petitioner's property for "constructing, adding to, maintaining, removing and repairing"

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[2]Much of the Statement of Facts set forth in the Writ Petition consists of "facts" which were not before the trial court when it granted summary judgment in Respondent's favor nor before the Court of Appeal when it affirmed the trial court. Petitioner asserts here that certain of these factual matters should have been considered by the trial court notwithstanding the tardy filing by Petitioner of her papers in opposition to Respondent's summary judgement motion. Writ Petition at 7, n. 3. The propriety of the trial and appellate court's refusal either to consider Petitioner's late filed declarations, or to judicially notice (as Petitioner requested) the manner in which her particular backyard easements have been utilized over the years, are questions purely of state law.

poles and lines for the transmission of electrical energy and for telephone lines. In July, 1979, GTC and Respondent entered into a pole lease agreement pursuant to which GTC granted Respondent permission to attach its cable television wire to GTC's poles.

In 1958, Petitioner and her husband (her counsel of record here) acquired title to the property. The deed, however, included a specific reservation in the grantor with respect to the easements over the rear five feet. Petitioner is permitted to use only the surface of the rear five feet "provided such use does not interfere with the installation, operation, or maintainance" of the easements.[3]

Sometime after July 1979, Respondent caused its wires to be strung across Petitioner's property within both the 1929 City Easement and the 1957 GTC Quitclaim Easement. The wire, which is within inches of Petitioner's rear property line, is attached to GTC poles which are located on the property of Petitioner's neighbors. It is one of numerous telephone and electric wires crossing her property in the same narrow strip of land at approximately the same height. Its presence there is permitted under established California common law property principles, which permit the apportionment to Barry of the existing easements.

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[3]The declaration referred to at Writ Petition 6, n. 2, with respect to the reservation in the 1958 deed, was not before the trial or appellate court. *Russell v. Southard*, 53 U.S. (12 How.) 139, 157, 13 L.Ed. 927, 935 (1851) ("This court must affirm or reverse upon the case as it appears in the record"). Moreover, the effect of the events set forth in that declaration merely raises yet another state law question.

REASONS WHY THE PETITION SHOULD BE DENIED

A. The California Court of Appeal Decision Rested on Independent and Adequate State Ground.

It has long been a settled rule of this Court's jurisdiction that "where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, our jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller,* 296 U.S. 207, 210, 56 S. Ct. 183, 184, 80 L. Ed. 158 (1935); *see also* R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice* § 3.1 at 107 (6th Ed. 1978) ("However, if that judgment [of the highest state court] can be said to rest on adequate nonfederal grounds, despite the presence of a substantial federal question, Supreme Court review is unavailable under § 1257 either by appeal or certiorari"). As this Court has noted, "Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. . . . If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate and independent grounds, we, of course, will not undertake to review the decision." *Michigan v. Long,* 463 U.S. 1032, 1040-41, 103 S. Ct. 3469, 3476, 77 L. Ed. 2d 1201 (1983).[4]

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[4] *State ex rel. Anderson v. Brand,* 303 U.S. 95, 58 S. Ct. 443, 82 L. Ed. 685 (1938), cited by Petitioner, is of course consistent with this rule. The state court there could have based its decision on a state ground, but did not do so, choosing instead to rely on the ground that the act complained of did not impair the relevant contract within the meaning of the federal constitution. *Id.* at 98, 58 S. Ct. at 445. After concluding that the state court had wrongly decided the federal

Petitioner concedes that if either of the easements is properly apportionable at common law, then no federal question exists for review by this Court.[5] Although below Petitioner made various arguments going to the scope of the easements, these arguments do not seem to be made here. Instead, Petitioner argues here that the easements are apportionable at common law only if they are "exclusive"; that these easements are not "exclusive"; and that therefore the state court so erred in applying basic California property law as to constitute a taking in violation of the federal Constitution.[6]

The decision of the California Court of Appeal with respect to the apportionability of the easements at common law was not novel, but accords with traditional common law property principles. The Court of Appeal held that, pursuant to these principles, the easements were "'exclusive' vis-a-vis their grantors who had no intention to provide utility services, and no management or control rights concerning the utility's easement use." Because the easements were exclusive, they could be apportioned to Respondent. *See Witteman v. Jack Barry Cable TV,* 183 Cal.App.3d 1001, 1007, 228 Cal.Rptr. 584, 588 (1986). This holding is not only adequate and independent of federal law, it eliminates the need to consider the federal question whether a California statute, or

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question, this Court remanded the case to the state court so as to allow it to consider the state question.

[5]"[T]he state law issue of the easements' scope (including their apportionability) is prior to the federal taking issue." Writ Petition 9.

[6]At Writ Petition 3, Petitioner identifies the Fifth Amendment as the constitutional provision which is violated. The Fifth Amendment, of course, only applies to action by the federal government, not by a state government. Respondent assumes that Petitioner intended to refer to the Fourteenth Amendment.

federal statute, which authorize a city to apportion a public easement to a cable franchise violates the federal Constitution.

Petitioner apparently understands that the common law grounds for the appellate court's holding is a very serious hurdle. Accordingly, almost all of her Writ Petition focuses on whether the interpretation and application of state common law is so unfair and erroneous that it is simply fluff that ought to be disregarded so that this Court can deal with the "real" issues, i.e., whether in the absence of common law sanction state or federal statutory law can justify the presence of Barry's wire in the easements.[7]

B. The Court of Appeal Decision Had A Fair and Substantial Basis Under California Law.

So long as a state court bases its decision upon state law, this Court will not "inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule for that of the state court." *Broad River Power Co. v. State of South Carolina,* 281 U.S. 537, 541, 50 S. Ct. 401, 403, 74 L. Ed 1023 (1930). This Court's review is limited to ensuring that the state court is not attempting to evade its constitutional obligations. *E.g., id.*

No such evasion has occurred.[8] The Court of Appeal's holding that the 1929 City Easement is exclusive and

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[7]Because Petitioner's Writ Petition is so preoccupied with the state common law grounds for the appellate court's decision, she almost totally ignores the statutes which she contends would be unconstitutional were they the basis (which they are not) for the appellate court's decision.

[8]The appellate court's heavy reliance on traditional common law principles is readily apparent from its decision. "*Salvaty* also relied

therefore apportionable is identical to the leading California case to discuss the apportionability of in gross easements for the transmission of cable signal. *See Salvaty v. Falcon Cable Television,* 165 Cal.App.3d 798, 804, 212 Cal.Rptr. 31 (1985) (permitting telephone company to apportion backyard easement to cable company, decided prior to *Witteman*). Moreover, the analysis employed is fully consistent with traditional law, as redacted in the Restatement of Property:

> Though apportionability may be to the disadvantage of the possessor of the servient tenement, the fact that he is excluded from making the use authorized by the easement, plus the fact that apportionability

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on . . . *Hoffman v. Capital Cablevision Systems, Inc.* . . . which had . . . turned to the legal principles set forth in 5 Restatment of the Law, Property, section 493, particularly subdivisions (c) and (d). *Hoffman* ascertained that such easements were easements in gross, exclusive vis-a-vis the grantor, and thus apportionable. . . . We note that in California easements involving the right-of-way have been considered 'easements in gross' since 1872. . . . Easements conveyed to public utilities are in the same category. They have been deemed 'exclusive' vis-a-vis their grantors who had no intention to provide utility services, and no management or control rights concerning the utility's easement use. This factor, in turn, has led to the conclusion of apportionability, without obtaining any consent of the holder of the servient estate [i.e., the homeowners]. . . . Rejecting the argument of nonexclusivity, the court [in *Savaty*] stated that 'Thus, insofar as it related to the apportionability of an easement in gross, the term 'exclusive' *refers to the exclusion of the owner and possessor of the servient tenement from participation in the rights granted,* not to the number of different easements in and over the same land.' . . . While *Salvaty* did not expressly rely on either Government Code section 53066 or Public Utilities Code section 767.5, basing its decision on basic traditional real property law, these statutes afford additional ground for recognizing apportionability and reflect the legislative understanding of the common law rules and their applicability to the expansion of cable television services." *Witteman,* 183 Cal.App.3d at 1007-1009 (emphasis in original).

> increases the value of the easement to its owner, tends to the inference in the usual case that the easement was intended in its creation to be apportionable. This inference is very strong in cases where an increase in use is in fact advantageous to the possessor of the servient tenement.

5 Restatement of Property, § 493 comment e (1944) (emphasis added).

The Court of Appeal's opinion is also consistent with decisions by courts outside of California which have considered apportionment of electrical or telephone easements to cable companies. *See Henley v. Continental Cablevision*, 692 S.W.2d 825, 827 (Mo. Ct. App. 1985) ("We believe the very nature of the 1922 easements obtained by both utilities indicates that they were intended to be exclusive and therefore apportionable"); *Hoffman v. Capitol Cablevision Systems*, 383 N.Y.S.2d 674, 676, 52 App. Div. 2d 313 (1976) ("Whether an easement in gross is apportionable depends largely on whether it is viewed as exclusive as opposed to nonexclusive . . . . [T]he very nature of the said 1954 easements obtained by the utilities indicates that they were intended to be exclusive,vis-a-vis the grantor"); *see also Clark v. El Paso Cablevision*, 475 S.W. 2d 575 (Tex. Civ. App. 1971) (affirming preliminary injunction enjoining homeowner from interfering with cable company's wire that was placed in public easement and upon a utility's pole where both the city and the utility allowed it to use their respective easements).[9]

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[9]Moreover, every court that has examined the issue has agreed with the conclusion reached by the California Court of Appeal that the existence of two easements is irrelevant to whether the easement is exclusive within the meaning of the common law. *See, e.g., Henley v. Capitol Cablevision System*, 692 S.W.2d at 829; *Hoffman v. Capitol Cablevision System*, 383 N.Y.S.2d at 678. The existence of two ease-

Ignoring Salvaty, the Restatement's redaction of well-accepted common law, and other states' decisions, Petitioner claims that there is no substantial basis for the Court of Appeal's opinion because it failed to address *Pasadena v. California-Michigan Land & Water Co.*, 17 Cal. 2d 576, 110 P.2d 983 (1941), which Petitioner insists supports her contention that the City's easement is not exclusive. The mere failure of a state court to discuss every case and every argument raised by the parties, however, does not render its decision without a fair and substantial basis. If such were the test, the independence of state courts could be destroyed and this Court would be forced to weigh and consider an endless number of state opinions to determine whether a state court should have considered them. That is neither the law nor the function of this Court.

Moreover, *Pasadena* is consistent with the analysis employed by the Court of Appeal and with the *Restatement*. The difference in results between *Pasadena* and the present case is occasioned by the difference in relevant facts, as to which Petitioner's Writ Petition is silent.[10]

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ments is particularly irrelevant here since the second easement was a *quitclaim* easement granted 30 years after the 1929 City Easement and involved wholly different parties. (Not surprisingly, nowhere in the Writ Petition does Petitioner reveal that the 1957 grant to GTC was by way of quitclaim.)

[10]At Writ Petition 11, n. 8, Petitioner contends that the basis for Respondent's argument that *Pasadena* is distinguishable is that "it involved water and not electricity, and that it concerned an easement in an unincorporated area of Los Angeles." As will be developed in the text, this is hardly a full and truthful statement of Respondent's position, which has been fully briefed on a number of prior occasions. *See, e.g.*, Brief of Respondent Jack Barry Cable T.V., filed in the Supreme Court of the State of California on February 27, 1987, at 65-70.

In *Pasadena*, the owner of the servient estate granted to defendant California-Michigan Land and Water Co., a water vendor, an easement to run certain water pipes on its land. 17 Cal. 2d at 585, 588 (dissent). Thereafter the servient estate granted to plaintiff City of Pasadena, a competing water vendor, the right to run water pipes in certain strips of its land, part of which coincided with the earlier grant to defendant California-Michigan. *Id.* at 585 (dissent). Finally, the servient estate granted to defendant California-Michigan the right to run water pipes in the same strips of land with respect to which it had previously granted rights to plaintiff City of Pasadena. *Id.* at 577. All apparently conceded that the servient estate also had the right to lay water pipes for its own use in the same strips of land. *Id.* at 592 (dissent). Prior to the litigation, plaintiff City of Pasadena had used its pipes in the easement to service about 24 consumers. *Id.* at 585 (dissent). Defendant California-Michigan, by installing its pipes in the same easement, had managed to obtain 22 of these customers. *Id.* at 586 (dissent).[11] Needless to say, based on these facts there was no real contention that *any* of these easements was exclusive.

> [A]ppellant [plaintiff City of Pasadena] does not make a serious claim that there was an intention to make this an exclusive easement; and any such intention would seem clearly contrary to the admitted facts, since prior easements in the same land [for the competing water lines of defendant California-Michigan Land and Water Co.] were in effect at the time when appellant's easements were granted.

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[11]Witteman, in her Writ Petition at 3, 9 and elsewhere, describes the easements in *Pasadena* as "public utility easements." *Pasadena* does not employ this phrase, but rather emphasizes that the easement owners were competitors.

Id. at 578. Instead, the "primary contention [was] that the easements granted to the defendant [California-Michigan] interfered with [the plaintiff's full enjoyment of its] prior easements as a matter of law." 17 Cal. 2d at 578. The Court rejected the contention and found for the defendant (California-Michigan) easement owner.

> Considering the fact that these easements were granted [to plaintiff City of Pasadena] for the limited purpose of securing domestic water service for the individual owners in this real estate subdivision and that no indication appears that the parties intended to protect the city against competition, we are unable to find any intent, either expressed or implied, that the owners were never to grant similar easements to anyone else.

Id. at 581.

The facts of the present litigation are very different from those found in *Pasadena;* accordingly, application of the black letter law redacted by the *Restatement* produces an entirely different result.[12] In *Pasadena,* all conceded that the owner of the servient estate could use the easements to run competing water lines. 17 Cal. 2d at 592. Here, Petitioner is "excluded from making the use authorized by the easement" (5 *Restatement of Property,* § 493 comment c) both as a matter of law and practical-

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[12]The *Restatement* provides that "the fact that [the owner of the servient tenement] is excluded from making the use authorized by the easement . . . tends to the inference in the usual case that the easement was intended in its creation to be apportionable." 5 *Restatement of Property,* § 493 comment c. In *Pasadena,* the owner was not excluded from making the use authorized by the easement, and indeed competitors for those same services were always envisioned and indeed already had overlapping easements. There was thus no basis to infer exclusivity.

ity.[13] In *Pasadena,* an easement to run water pipes in the same land had been granted to defendant even before plaintiff obtained that right. In the present case, no easement for electricity preceded the 1929 City Easement, and no easement for telephone preceded the 1957 GTC Quitclaim Easement. In *Pasadena,* the plaintiff's easement was obtained in order to compete for a limited number of consumers, and competition was always envisioned. Here, no such competition was ever permissible as a matter of law, and indeed Petitioner has herself contended throughout this litigation that the provision of both telephone and electrical services are "natural monopolies" (*see, e.g.,* Petitioner's Opening Brief in the Court of Appeal at 29:5-7). For these reasons, *Pasadena* is

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[13]Petitioner has never disputed that the provision of electrical services within Los Angeles has at all relevant times been done by monopolies established or franchised by the City. *See* California Constitution, Art. 11, § 19 (providing since 1879 that municipalities could establish public works for the provision of electricity); Stats. 1915, Ch. 660, at 1300-01 (providing, among other things, for cities to grant franchises for the "erect[ion of] poles or wires for transmitting electricity"); Charter of the City of Los Angeles, Art. XXII, § 220(1) (enacted in 1924 and providing to the Department of Water and Power "the power and duty . . . [t]o construct, operate, maintain, extend, manage and control works and property for the purpose of supplying the city and its inhabitants with . . . electric energy"). Similarly, Petitioner has never disputed that the expense of providing electric service, the difficulties of access, and the dangers inherent in creating competing sets of poles and electrical wires also dictate that this service be exclusively provided by monopolies. Because of these inherent dangers and the difficulties of access, the height of and distance between the various wires has at all times relevant to this litigation been governed by law (*see* California Public Utilities Commission, *General Order No. 95,* Rules for Overhead Electric Line Construction, Rules 37 and 38, promulgated in 1941 and replacing General Order 64-A, issued in 1928), thus making it impossible for competing wires to be constructed within a single four foot strip of land such as the 1929 City Easement.

not inconsistent with the Court of Appeal's decision below; to the contrary, each applies the identical well settled law but reaches different results because the facts are different.

C. Petitioner Cannot Create Jurisdiction by Claiming that the Court of Appeal's Decision by Itself Constitutes a "Taking."

As discussed above, the Court of Appeal's decision is completely consistent with California common law principles with respect to the circumstances under which easements are apportionable. But even if the opinion were a break with controlling California common law precedent, Petitioner has presented no authority — save the concurring opinion of a single Justice which has never been the basis of any holding by this Court — that a judicial opinion setting forth "a sudden change in state law" can itself represent a "taking" under the Fourteenth Amendment.

Petitioner's contention is similar to the contentions, long since rejected, that legislative actions regulating property which changed the law were takings, *see Munn v. Illinois,* 94 U.S. 113, 24 L. Ed. 77, 87 (1877), and should be similarly rejected. Whether a court's decision represents a change in the law has never been the constitutional test. For example, in *Robins v. PruneYard Shopping Center,* 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979), the California Supreme Court completely reversed a decision reached only five years earlier and held that a private shopping center could not exclude individuals. The fact of the reversal played no part in this Court's analysis as to whether the prohibition on exclusion constituted a taking. *See PruneYard Shopping Center v. Robins,* 447 U.S. 74, 78, 100 S. Ct. 2035, 2039, 64 L. Ed. 741 (1980). Yet, under Petitioner's excessively restrictive

view of a state's ability to fashion its own law, that fact alone would be conclusive.

CONCLUSION

For each of the foregoing reasons, Respondent respectfully urges this Court to deny the Petition for Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 87-936

In the Supreme Court

OF THE

United States

MARY M. WITTEMAN,
Petitioner,

VS.

JACK BARRY CABLE TV,
Respondent.

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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15pp

TABLE OF CONTENTS

	Page
Reply to Respondent's Opposition to Petition for Writ of Certiorari	1
1. The Court of Appeal's Decision Makes Clear that Mrs. Witteman's Claim Is Federal and Constitutional in Character	1
2. The Court of Appeal's Decision Necessarily Negates Mrs. Witteman's Constitutional Rights, Under the Fifth and Fourteenth Amendments, to Be Free of an Uninvited Physical Occupation of Her Property—and Thus the State Grounds Asserted by Respondent Are Not Independent	3
3. The Court of Appeal's Decision Had No Fair or Substantial Basis Under California Law—and Thus the Court's State Ground, Even if Independent, Is Not Adequate	5
4. Respondent's Attempt to Distinguish the Pasadena Case From That at Bar is Wholly Without Basis	8
Conclusion	9

TABLE OF AUTHORITIES

Cases

Page

Chandler v. Hart, 161 Cal. 405, 417-18 (1911) 6

Indiana ex rel. Anderson v. Brand, 303 U.S. 96, 98, 82 L. Ed 688 (1937) 2

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 4

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982) .... 2, *passim*

Northern Transportation Co. v. Chicago, 99 U.S. 635, 642 (1879) 3

NYT Cable TV v. Homestead at Mansfield, Inc., 214 N.J. Super. 148, 518 A.2d 748, 754 (1986) 6

Pasadena v. California-Michigan Land and Water Co., 17 Cal. 2d 576, 578-79 (1941)..... 7-9

Postal Telegraph-Cable Co. v. City of Newport, 247 U.S. 464, 475-76 (1919) 8

Preferred Communications v. City of Los Angeles, ____ U.S. ____, 90 C. Ed. 2d 480, 106 S. Ct. 2034 (1986) . 5

Salvaty v. Falcon Cable Television, 165 Cal. App. 3d 798, 804, 212 Cal. Rptr. 31 (1985) 5

Stanton v. T.L. Herbert & Sons, 211 S.W. 353, 356 (Tenn. 1919) 6

United States v. Pewee Coal Co., 341 U.S. 114, 116 (1951) 4

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980) 7

Western Union Telegraph Co. v. Pennsylvania R. Co., 195 U.S. 540 (1904) 3

Witteman v. Jack Barry Cable TV, 183 Cal. App. 3d 1001 (opinion deleted), 228 Cal. Rptr. 584, 587, 192 Cal. App. 3d 1619, 1624 (1986) ..... 2, *passim*

TABLE OF AUTHORITIES

Statutes, Constitution, City Charter

	Page
Fifth Amendment and Fourteenth Amendment	2-5
Charter of The City of Los Angeles, Section 220(1)	9
47 U.S.C. 541(a)(2).	6

Other Authorities

5 Restatement of Property, § 493 comment c (1944)	6-7

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REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In its Opposition to Mrs. Witteman's Petition for Writ of Certiorari ("Opposition"), Respondent mischaracterizes both the California Court of Appeal's decision herein and the nature and theory of Mrs. Witteman's case, necessitating this Reply.

1. The Court of Appeal's Decision Makes Clear that Mrs. Witteman's Claim Is Federal and Constitutional in Character

Respondent's Opposition attempts to deny the constitutional dimension of Mrs. Witteman's claims. Opposition at 1-3, 5-7, and *passim*.

The California Court of Appeal's decision makes it immediately clear, however, that Respondent's attempt must fail. At the beginning of its opinion, the California Court of Appeal discussed for two paragraphs this Court's decision on the constitutional taking issue in a six year old case involving cable television.

Witteman v. Jack Barry Cable TV, 183 Cal. App. 3d 1001 (opinion deleted), 228 Cal. Rptr. 584, 587, 192 Cal. App. 3d 1619, 1624 (1986), reprinted at Appendix C-4 to Petition for Writ of Certiorari to the California Court of Appeal (hereinafter "Petition"), citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982) (hereinafter "*Loretto*").

The California Court of Appeal understood full well the holding of this Court in *Loretto*

> . . . that a New York statute requiring the nonconsenting owner of real property to permit installation of cable television facilities therein constituted a taking of private property without compensation, prohibited by the United States constitution.

Petition Appendix at C-4. The Court of Appeal concluded that Mrs. Witteman "commenced this litigation in reliance, at least in part, on *Loretto*." *Id.* Contrary to Respondent's contentions (Opposition at 2), Mrs. Witteman has argued and relied on *Loretto* from the trial court (in opposition to summary judgment) forward.

Mrs. Witteman clearly asserted her rights, under *Loretto* and the Fifth and Fourteenth Amendments (see below), before the Court of Appeal, and the Court of Appeal just as clearly rejected those rights. Petitioner submits that the Court of Appeal deemed a federal question "to be before it, [and] actually entertain[ed] and decide[d] that question adversely to the federal right asserted." *See Indiana ex rel. Anderson v. Brand*, 303 U.S. 96, 98, 82 C. Ed 688 (1937). Where that is the case, "this Court has jurisdiction to review the judgment." *Id.*

2. The Court of Appeal's Decision Necessarily Negates Mrs. Witteman's Constitutional Right, Under the Fifth and Fourteenth Amendments, to Be Free of an Uninvited Physical Occupation of Her Property—And Thus the State Grounds Asserted by Respondent Are Not Independent

What is at issue here is Mrs. Witteman's constitutionally protected right to exclude uninvited[1] third parties from her property. Citing historical taking analysis, this Court in *Loretto* identified the forced entry of third parties as the essence of a taking: a taking occurs when permanent "entry [is] made upon the plaintiffs' lot." *Loretto*, 458 U.S. at 428, quoting from *Northern Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1879). A "taking has always been found" in "cases involving a permanent physical occupation" of plaintiff's land. *Loretto*, 458 U.S. at 428.

In fact, a taking has been found precisely in the situation where a third party invades a previously granted *easement*. In *Western Union Telegraph Co. v. Pennsylvania R. Co.*, 195 U.S. 540 (1904) a telegraph company attempted to construct and operate its lines over a railroad's right of way. This Court then assumed that such invasion would be a taking, and held that the right of way "cannot be appropriated in whole or in part except upon the payment of compensation." *Id.* at 570, quoted with approval in *Loretto*, 458 U.S. at 430.

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[1] Were Respondent simply the extension of a traditional common carrier communications net, it might better be argued that Respondent was in fact "invited" when Petitioner granted an easement to General Telephone for public utility phone service. Respondent would still, however, have to clear the "one stock" hurdle of the common law apportionment cases. See Petition footnote 7, at page 10. In fact, Respondent is here not part of a common carrier communications net, and is not operating its facilities as "one stock" with the phone company. Rather, Respondent is an entrepreneur selling entertainment and advertising product to only a fraction of the houses it passes. Under the Court of Appeal's decision, there is nothing to stop the state and federal governments from granting similar access easements over Mrs. Witteman's property to any number of other entertainment and advertising entrepreneurs.

Later cases

> clearly establish that permanent occupations of land by such installations as telegraph and telephone lines, roads, and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land.

Loretto, 458 U.S. at 430 (citations omitted).

In the instant case, the cable company, under government sponsorship, has accomplished an "actual taking of possession and control" of easement rights over Mrs. Witteman's property. *See United States v. Pewee Coal Co.*, 341 U.S. 114, 116 (1951). In so doing, federal and state government has imposed on Mrs. Witteman an even more onerous servitude than was found to be a taking in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (physical *invasion*, but not permanent *occupation* of property). In that case, the imposition of a navigational servitude took from the underlying landowner the landowner's *right to exclude*, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.* at 176; see also *id.* at 180 ("And even if the Government physically invades *only an easement* in property, it must nevertheless pay compensation") (emphasis added).

The Court in *Loretto* identified several of the "strands" of the property rights "bundle" which are "chopped through" by a permanent, physical occupation of property: the power to exclude, the power to control the use of the property (including presumably the right to grant non-interfering easements to third parties), and the owner's "expectation that he will be relatively undisturbed at least in the possession of his property." *Loretto*, 458 U.S. at 435-36 (adding that "to require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury").

Here, the challenged statutes, and the Court of Appeal's decision upholding them, chop through each of the above-identified strands of Mrs. Witteman's bundle of constitutionally protected property rights. They allow the cable company, and other

companies after it,[2] to "exercise complete dominion" over a significant segment of Mrs. Witteman's property.[3]

The Court of Appeal's Decision, even though it might purport to be based on a *state ground, necessarily negates Mrs. Witteman's constitutionally protected rights in dominion, privacy, and control over the uses to which her backyard is put.* Thus, the state property law and the constitutional "issues are intertwined in one federal question," as Mrs. Witteman clearly stated in her Petition (at 9), contrary to Respondent's contentions to the contrary. Opposition at 2.

3. The Court of Appeal's Decision Had No Fair or Substantial Basis Under California Law—And Thus The Court's State Ground, Even if Independent, is Not Adequate

Respondent claims that the California Court of Appeal's decision herein was supported by its previous decision in *Salvaty v. Falcon Cable Television*, 165 Cal. App. 3d 798, 804, 212 Cal. Rptr. 31 (1985), by "the Restatement's redaction of well-accepted common law," and by "other states' decisions." Opposition at 10. A closer look at this purported "authority" reveals it to be insubstantial and illegitimate, and directly contrary to established California law.

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[2] As previously noted, this Court's holding in *Preferred Communications v. City of Los Angeles*, ____U.S.____, 90 C. Ed. 2d 480, 106 S. Ct. 2034 (1986) raises the spectre that there will be more television cables in Mrs. Witteman's backyard. The *Loretto* court saw the potential for increased burden as a significant part of its analysis: "Indeed, it is possible that in the future, additional cable installations that more significantly restrict a landlord's use of the roof of his building will be made." *Loretto*, 458 U.S. at 437; *see also id.* at n.14.

[3] As to the size of intrusion or the magnitude of the affected property rights necessary to trigger a taking, see *Loretto*, 458 U.S. at 437, n.13 ("telephone wire . . . strung across plaintiff's property without touching soil" is sufficient).

Salvaty and the "other states' decisions"[4] amount to no more than four recent cases by lower state courts (Opposition at 8-9), all of which involve cable television and most of which attempt to legitimize cable television's asserted right to use public utility easements by an *ad hoc* apportionment theory, with no citation to its common law antecedents.[5]

Rather than explore the common law of apportionment, the four cable television decisions rest their logic on a misreading of the Restatement of Property. Opposition at 8-9, citing 5 Restatement of Property, § 493 comment c (1944) (which in turn cites no case law whatsoever). Contrary to the logic of these cases, the Restatement's inference of apportionability is not a necessary conclusion from a finding of exclusivity; rather, exclusivity is a necessary (but not independently sufficient) prerequisite to ap-

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[4] As noted in the Petition herein (at 19-20), some state courts have not allowed cable to use public utility easements. Furthermore, in the analogous context of "forced entry" cases, *Loretto* has been found to apply, and cable's government-sponsored placement over private property to be a compensable taking. *See, e.g., NYT Cable TV v. Homestead at Mansfield, Inc.*, 214 N.J. Super. 148, 518 A.2d 748, 754 (1986) (acknowledging that statute similar in form to 47 U.S.C. 541(a)(2) works a taking, but finding compensation mechanism within the statute.).

[5] Had either the *Salvaty* court or the Court of Appeal herein considered the traditional common law "one stock" test in ruling on apportionment of easements, the result may have been quite different. *See* Petition at n. 7, including *Chandler v. Hart*, 161 Cal. 405, 417-18 (1911) (approving the traditional "one stock" test for the apportionability of easements, and noting that "it will not be presumed that [the servient owner] intended such right to be exercised by more than one unless he so declares").

Petitioner inadvertently mischaracterized the *Chandler v. Hart* case at footnote 7 of her Petition. The Court in *Chandler* approved of, but did not "apply," the "one stock" test, deciding that it was inapplicable to the facts of that case because of the unique nature of the oil business. *See also Stanton v. T.L. Herbert & Sons*, 211 S.W. 353, 356 (Tenn., 1919) ("We do not understand [*Chandler*] as disapproving *Lord Mountjoy's Case* [source of the 'one stock' rule]").

portionability. After exclusivity is found, the intention of the grantor to permit apportionment must still be established. Here there is neither exclusivity (see Petition at 5, 10), nor any manifest intent that the easements be apportionable. The Restatement itself states that "apportionability of the easement will not be assumed in the absence of a clear indication to the contrary," and that the servient property owner usually "retains the power to create like privileges in others." *Id.* at comment d.

More importantly, the Restatement is not the law of the land in California. California law is. Here, the Court of Appeal's reliance on the Restatement in concluding that public utility easements "have been deemed 'exclusive' vis-a-vis their grantors" (Court of Appeal opinion at Appendix C-6 of Petition) is clearly inconsistent with the California Supreme Court's ruling that

> No intention to convey such a complete interest [exclusive easement] can be imputed to the owner of the servient easement in the absence of a clear indication of such an intention . . . An "exclusive easement" is an unusual interest in land; it has been said to amount to almost a conveyance of the fee . . . It is not necessary for [the servient owner] to make any reservation to protect his interests in the land, for what he does not convey, he still retains. Furthermore, since he retains the right to use the land reasonably himself, he retains also the power to transfer those rights to third persons.

Pasadena v. California-Michigan Land and Water Co., 17 Cal. 2d 576, 578-79 (1941) (citations omitted) (hereinafter "*Pasadena*"). The Court here refused to consider *Pasadena.*

The legislative and judicial decisions obtained by the cable television industry to date stand this established law on its head, and violate all of the constitutional property protections described above. The State has not merely "regulated" the use of Mrs. Witteman's property, as Respondent suggests (Opposition at 14), but it has "*ipse dixit* . . . transform[ed] private property into public property without compensation," an approach consistently rejected by this Court. *See, e.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

Where the State Court of Appeal overlooks obviously controlling and generally accepted law, its decision cannot be said to be adequate. *Postal Telegraph-Cable Co. v. City of Newport*, 247 U.S. 464, 475-76 (1919).

4. Respondent's Attempt to Distinguish the *Pasadena* Case From That at Bar Is Wholly Without Basis

Respondent's extended attempt to distinguish on its facts the case of *Pasadena v. California-Michigan Land & Water Co.*, *supra* (1941) from the instant case finds no basis whatsoever in the facts or holding of the *Pasadena* court. Opposition at 10-14.

First, Respondent purports to ground a large part of its effort on the text of the dissenting opinion in what was apparently a 4-2 decision of the California Supreme Court. *See* Opposition at 11. In this, Respondent mischaracterizes the dissenting opinion. Respondent states that "[a]ll apparently conceded that the servient estate also had the right to lay water pipes for its own use in the same strips of land." Id., citing *Pasadena*, 17 Cal. at 592 (dissent). The majority is silent on this point, and Petitioner reads the cited page of the dissent to state the exact opposite of what Respondent claims.

Respondent also mischaracterizes the central issue in *Pasadena*, claiming that it concerned the "interfere[nce] with prior easements" rather than whether the prior easement was exclusive. Opposition at 12. Pasadena, however, premised its argument on the theory that the "owners of the servient tenements had no power to grant easements similar to plaintiff's in the same strip of land." *Pasadena*, 17 Cal. 2d at 577. California-Michigan joined the issue by "denying among other things that the city ever possessed or enjoyed any right to exclusive use of the easements." *Id.* at 586. The Court of course decided for California-Michigan.

Respondent further misleads this Court by stating that "[i]n *Pasadena*, an easement to run water pipes *in the same land* had been granted to defendant even before plaintiff obtained that right." Opposition at 13 (emphasis added). The situation was exactly the reverse: *in the relevant portion of land*, Pasadena had the first easement. While it is true that California-Michigan did

have other easements ("six foot easements") in the general area for "pipe line purposes" (17 Cal. 2d at 585, 588), the five foot easement at issue (along Arcadia Avenue) was granted first to Pasadena, and then subsequently to California-Michigan ("an easement practically identical with the easement already owned by the city"). *Id.* at 584-86.

Finally, Respondent quotes from the Charter of the City of Los Angeles, Section 220(1), for the implied proposition that electricity service, but not water service, is monopolistic in nature. Opposition at 13, n. 13. In truth, however, the quoted portion of Section 220(1) speaks of water and electrical service in the same breath: ". . . for the purpose of supplying the city and its inhabitants with *water and* electric energy." (Emphasis added.) Unfortunately, Respondent chose to delete the two underlined words from its quotation of that Section.

In sum, the *Pasadena* court makes no distinction between water and electrical service, and its holding is squarely applicable to the facts in the case at bar. In ignoring this authority, the California Court of Appeal (and, tacitly, the California Supreme Court) has suddenly and unpredictably altered the settled expectations of California easement law, violating in the process Mrs. Witteman's constitutional rights.

CONCLUSION

Apparently responding to some perceived technological imperative, several lower state courts have sought to give the cable industry *carte blanche* access to easements over private backyards. In so doing, however, they have trampled on the servient landowners' constitutionally protected property rights, and drastically and impermissibly altered the common law.

This Court should not join the rush to accomodate the cable television industry at the cost of discarding established constitutional and common law principles. Certiorari should be granted. At a minimum, the case should be remanded to the California courts for a consideration of the *Pasadena* case and other issues left unconsidered and undecided by the California courts.

DATED: January 9, 1988

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